STATE OF MICHIGAN
IN THE SUPREME COURT

Coalition Protecting Auto No-Fault (CPAN), et al.

Plaintiff-Appellant,

v.

The Michigan Catastrophic Claims Association (MCCA),

Defendant-Appellee. /

Supreme Court Case No. 150001

Court Of Appeals Case No. 314310

Ingham County Circuit Court
Case Nos. 12-68-CZ, 12-659-CZ
(consolidated)

Brain Injury Association of Michigan (BIAMI), et al.

Plaintiff-Appellant,

v.

The Michigan Catastrophic Claims Association (MCCA),

Defendant-Appellee..

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

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DEFENDANT-APPELLEE THE MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION'S SUPPLEMENTAL BRIEF

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The Court requested supplemental briefing addressing "whether MCL 500.134 violates Const 1963, art 4, § 25 by creating an exemption to the Freedom of Information Act (FOIA – MCL 15.231 *et seq.*) without reenacting and republishing the sections of FOIA that are altered or amended." (Feb. 4, 2015 Order). As explained in the Michigan Catastrophic Claims Association's ("MCCA") Response in Opposition to Plaintiffs' Application for Leave to Appeal, the Court of Appeals (Judges Owens, Borrello and Gleicher) correctly and unanimously rejected Plaintiffs' argument that MCL 500.134[1] violates Const 1963, art 4, § 25 ("Section 25") because no section of the Freedom of Information Act ("FOIA") was amended, altered or revised by the Legislature's enactment of MCL 500.134. The MCCA fully incorporates and supplements those arguments with the following information, per this Court's request.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY REJECTED PLAINTIFFS' ARGUMENTS THAT MCL 500.134 VIOLATED CONST 1963, ART 4, § 25.

A. The Legislature Did Not Violate Const 1963, art 4, § 25 When It Enacted 1988 PA 349.

Plaintiffs claim that the Legislature violated Const 1963, art 4, § 25 when enacting 1988 PA 349 (codified at MCL 500.134) because they contend that the Legislature amended FOIA without republication. (Application, p 23). The Court of Appeals quickly rejected this argument, correctly recognizing the Plaintiffs' argument was based on a false premise.[2] (Court of Appeals' Opinion, p 7). The plain language of Section 25 is very clear:

[1] Presumably the Court's request intended the parties to address whether the Legislature's enactment of 1988 PA 349, which provided for the FOIA exemption at issue in this case, violated Const 1963, art 4, § 25 since MCL 500.134 is comprised of several public acts. The MCCA's reference to MCL 500.134 herein is intended to refer to 1988 PA 349.

[2] The Court of Appeals also rejected Plaintiffs' article 4, § 25 arguments when they were made once again in Plaintiffs' Motion for Reconsideration.

> No law shall be ***revised, altered or amended*** by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length.

(Emphasis added). MCL 500.134 does not violate Section 25 because it does not revise, alter or amend FOIA, by reference or otherwise. Similarly, Plaintiffs' argument that the Legislature has "give[n] itself permission to violate the Constitution" by providing in FOIA that exemptions to that Act may exist in other statutes (Application, pp 22-23) is wholly without a constitutional basis or merit. The Application for Leave to Appeal should be denied.

1. Under the Plain Language of Const 1963, art 4, § 25, There Is No Unconstitutional Amendment.

Under Section 25, the Legislature may not *revise, alter or amend* a law by reference to its title only. That is the full extent of the constitutional prohibition. Nothing in the language of Section 25 prohibits the Legislature from indicating in a law that exceptions to that law's provisions may be included in other statutes, as is provided in FOIA. MCL 500.134 does not "create an exemption" to FOIA by referring to FOIA and then amending it in violation of Section 25 because MCL 500.134's enactment did not amend FOIA, either by reference or by implication. Rather, MCL 500.134 did precisely what FOIA itself says can be done, in that FOIA provides that exemptions to its provisions may exist in other statutes.[3] Specifically, MCL 15.243, entitled "Exemptions from disclosure", provides that "a public body may exempt from disclosure under this Act [FOIA] any of the following….(d) records or information specifically

[3] See MCL 15.235(5)(a), MCL 15.243(1)(d), and MCL 15.243(1)(h) (providing that documents subject to the certain listed privileges like the attorney-client privilege or "or other privilege recognized by statute or court rule" may also be exempted from disclosure). If FOIA did not include such provisions, Plaintiffs may have a stronger argument that MCL 500.134 violates Section 25, but, as explained below, that argument would ultimately still be unsuccessful because the Insurance Code, of which MCL 500.134 is a part, is an "act complete in itself", which this Court has recognized is an exception to Section 25.

described and exempted from disclosure by statute." MCL 15.243(1)(d). And MCL 15.235(5)(a) requires a public body's written notice denying a request for a public record to include an "explanation of the basis under this act ***or other statute*** for the determination that the public record" is exempt from disclosure. (Emphasis added). Thus, as the Court of Appeals correctly held, the "Legislature drafted FOIA in a manner to allow future statutory exemptions without the need to revise or amend FOIA." (Court of Appeals' Opinion, p 7).

As in numerous other circumstances, the Legislature in MCL 500.134(4) exercised its ability under FOIA to exempt the records of the MCCA (among others) from FOIA in a separate statute.[4] Namely, MCL 500.134(4) states that records "of an association or facility shall be exempted from disclosure pursuant to [MCL 15.243]…" And MCL 500.134(6) defines "association or facility" to include, among other entities, the MCCA.[5] The exemption under

[4] Exhibit A provides a non-comprehensive list of FOIA exemptions contained in statutes outside of FOIA that would be unconstitutional under Plaintiffs' argument. This list does not include every privilege recognized by statute or court rule that would also be exempt under MCL 15.243(1)(h). If Plaintiffs are correct, then the Legislature would need to amend FOIA to include every FOIA exception currently found elsewhere in Michigan law, of which, as Exhibit A makes clear, there are many.

[5] As explained in the MCCA's Response to Plaintiffs' Application, the legislative purpose for creating this exemption is exceedingly clear from Section 25 of 1988 PA 349—the Legislature, recognizing that the MCCA is a non-profit, private association, wanted to ensure that the MCCA and like associations and facilities would not be treated as state agencies or public bodies for many purposes, including FOIA. This action aligns with this Court's proclamation in *League General Ins Co v Michigan Catastrophic Claims Assoc*, 435 Mich 338, 350; 458 NW2d 632 (1990) (stating that "[t]aken as a whole, the characteristics of the MCCA lead us to recognize it as a private association.") as well as the stated public policy behind FOIA, which is to give citizens "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees" so that they may fully participate in the democratic process. MCL 15.231(2). The MCCA is a non-profit, private association. It is entirely funded by the private insurers that make up its membership—the MCCA does not collect monies from policyholders; it collects assessments from its member insurers. And the directors of the MCCA are not state officials nor are the MCCA's employees public employees. Simply put, the MCCA is not a "public body" for FOIA purposes.

MCL 500.134 does not change the wording of, modify, or reexamine—i.e., amend, alter, or revise[6]—FOIA. It merely does what FOIA permits. There is no section of FOIA to re-enact or republish because no section of FOIA was revised, altered, or amended when the Legislature enacted MCL 500.134.

As explained in the MCCA's Response in Opposition to Plaintiffs' Application for Leave, this conclusion is entirely consistent with the leading case law on Section 25, including *Alan v County of Wayne*, 388 Mich 210; 200 NW2d 628 (1972) and *Nalbandian v Progressive Michigan Ins Co*, 267 Mich App 7; 703 NW2d 474 (2005). (See MCCA's Response to Application, pp 23-25). Neither of the statutes in *Alan* or *Nalbandian* provided that other statutes could provide exceptions to their provisions (i.e., adding exceptions to those provisions in separate statutes had the effect of amending the original statute).[7] The facts presented by this case are completely different. In fact, this case aligns more closely with this Court's decision in *Midland v Mich State Boundary Comm'n*, 401 Mich 641, 659-660; 259 NW2d 326 (1977),

[6] "Amend" is defined in Black's Law Dictionary as "to change the wording of, to formally alter by striking out, inserting, or substituting words." An alteration is "an act done to an instrument whereby its meaning or language is changed[.]" A revision is a "reexamination or careful analysis for correction or improvement . . . [a]n altered version of a work." Black's Law Dictionary (9th ed).

[7] In *Alan*, the challenged statute actually incorporated substantive provisions of another act by direct reference and then claimed those provisions were amended. The exact language at issue provided:

> the authority may issue self-liquidating revenue bonds in accordance with and **subject to the provisions of Act No. 94 of the Public Acts of 1933**, as amended, being sections 141.101 to 141.139 of the Complied Laws of 1948, **except that** the bonds may be either serial bonds or term bonds or any combination thereof, as shall be determined by the authority.

MCL 123.961 (1970) (emphasis added). This clearly presents a very different issue than that in this case.

where this Court found no violation of Section 25 when the challenged statute did not "expressly or otherwise, dispense with or change the provisions" of the statute plaintiffs claimed was required to be republished. *Id.*

Stated simply, FOIA is **not** revised, altered, or amended when the Legislature enacts an exemption in a separate law like that in MCL 500.134(4). Thus, no provision of FOIA was required to be republished under Section 25. The inquiry into the constitutionality of MCL 500.134 should end here. The Court of Appeals correctly rejected Plaintiffs' argument that MCL 500.134 violated Const 1963, art 4, § 25.

2. Const 1963, art 4, § 25 Does Not Restrict the Legislature's Plenary Authority By Prohibiting It From Providing in Statute A That Exemptions to Statute A May be Found in Other Statutes.

Plaintiffs acknowledge that FOIA contains an express recognition of exceptions in other statutes, but in an apparent attempt to get around this damning fact, argue that by doing so the Legislature has "give[n] itself permission to violate the Constitution." (Application, pp 22-23). In other words, Plaintiffs appear to ask this Court to also hold that the Legislature acted unconstitutionally when it enacted MCL 15.243(1)(d) and for that reason, MCL 500.134 violates Section 25. Again, this argument is based on a false premise. It fails to recognize that the Legislature's authority in Michigan is plenary and only limited by the federal and Michigan Constitutions.

> A different rule of construction applies to the Constitution of the United States than to the Constitution of a State. The Federal government is one of delegated powers, and all powers not delegated are reserved to the States or to the people. When the validity of an act of congress is challenged as unconstitutional, it is necessary to determine whether the power to enact it has been expressly or impliedly delegated to congress. **The legislative power, under the Constitution of the State, is as broad, comprehensive, absolute and unlimited as that of the parliament of England, subject only to the Constitution of the**

United States and the restraints and limitations imposed by the people upon such power by the Constitution of the State itself.

Young v Ann Arbor, 267 Mich 241, 243; 255 NW 579 (1934) (emphasis added); see also *Council 23 American Federation of State, Co & Muni Employees v Civil Service Com*, 32 Mich App 243, 248; 188 NW2d 206 (1971) ("The legislature's power to legislate is unlimited, except as expressly limited by the Constitution.").

Indeed, this Court gives deference to a deliberate act of the Legislature and does not inquire into the wisdom of its legislation. *Dearborn Twp v Dearborn Twp Clerk*, 334 Mich. 673, 690; 55 NW2d 201 (1952). Rather, this Court has recognized that the "power to declare a law unconstitutional should be exercised with extreme caution and never where serious doubt exists with regard to the conflict." *Council of Orgs & Others for Educ About Parochiaid v Governor*, 455 Mich 557, 570; 566 NW2d 208 (1997), citing *Thayer v Dep't of Agriculture*, 323 Mich. 403, 413; 35 NW2d 360 (1949). "Every reasonable presumption or intendment must be indulged in favor of the validity of the act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity." *Id.*, citing *Cady v Detroit*, 289 Mich. 499, 505; 286 NW 805 (1939).[8] Plaintiffs' argument essentially asks this Court to find that the Legislature chose to ignore (or, worse, intentionally violate) the Constitution when it enacted MCL 15.243(1)(d). In other words, to accept Plaintiffs' arguments that the Legislature gave itself permission to violate the Constitution by enacting MCL 15.243(1)(d) would be to (1) ignore the plain language of Const 1963, art 4, § 25 and the plenary authority granted to Legislature and (2) reject well-

[8] Moreover, the Constitution, including art 4, § 25, must be construed in a reasonable manner. *Alan*, 388 Mich at 277, citing *People v Mahaney*, 13 Mich 481 (1865).

established precedent that recognizes that this Court must presume that the Legislature has acted in accordance with the Constitution.

As stated above, the plain language of Section 25 prohibits the revising, altering, or amending of a law by reference to its title only. Nowhere in Section 25 does it state that the Legislature's plenary authority is restricted from enacting a statute that states that exemptions to that particular statute may exist in separate statutes. The Plaintiffs would have this Court constrain the Legislature in way in which the People of the State of Michigan have not.

Moreover, if the Legislature violated the Constitution by enacting MCL 15.243(1)(d), it has done so in countless other statutes. There are, for example, over 130 statutes that use the phrase "except as otherwise provided by law", which would certainly include allowing exceptions to be found in separate statutes.[9] And in addition to MCL 500.134, there are many other statutes that use the phrase "as exempted by law"[10] or "except as otherwise provided by

[9] See, e.g., MCL 18.1486 ("**Except as otherwise provided by law**, each internal auditor shall report to and be under the general supervision of the department head."), MCL 24.278 ("**Except as otherwise provided by law**, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties."), MCL 168.467i ("**Except as otherwise provided by law**, the term of office for judge of the district court shall be 6 years. . . ."), MCL 600.821 ("The salary provided in this section is full compensation for all services performed by a probate judge, **except as otherwise provided by law**."), MCL 600.854 ("**Except as otherwise provided by law**, any notice required by law shall be governed by supreme court rule."), and MCL 600.2157 ("**Except as otherwise provided by law**, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character. . . ."). This Court, in the Michigan Court Rules, has also utilized similar language. See, e.g., MCR 3.205(C)(2) ("A subsequent court must give due consideration to prior continuing orders of other courts, and may not enter orders contrary to or inconsistent with such orders, **except as provided by law**."), MCR 3.930(A) ("**Except as otherwise required by statute or court rule**, materials that are intended to be used as evidence at or during a trial shall not be filed with the clerk of the court, but shall be submitted to the judge for introduction into evidence as exhibits."); MCR 7.209(E) (**Except as otherwise provided by law or rule**, the trial court may order a stay of proceedings, with or without a bond as justice requires.").

[10] See, e.g., MCL 600.2920(1)(b) ("An action may not be maintained under this section . .

statute"[11] or "as established by law." In other words, there are hundreds of instances of the Legislature recognizing in a statute that exceptions may be found in other statutes. Such enactments do not run afoul of Section 25—the Legislature is not amending, altering, or revising a statute when it states that exceptions may be found in other statutes. There is nothing hidden from the public.

Section 25 was designed to ensure that both legislators and the public were apprised of statutory changes and the content of the act that is revised, altered or amended—essentially to give notice. See, e.g., *Mahaney*, *supra* at 497. There is nothing misleading or deceptive by providing in FOIA (or the countless other statutes set forth in the footnotes above) that exceptions could be in separate statutes and by then enacting a separate statute (here, MCL 500.134(4)) that does just that. The public is put on notice that exceptions to FOIA may exist in other statutes—not once, not twice, but three times, in FOIA itself (see MCL 15.235(5)(a), MCL

. unless the goods or chattels are **exempted by law** from execution or attachment."), MCL 211.2(1)(a) ("All land within this state, all buildings and fixtures on the land, and all appurtenances to the land, **except as expressly exempted by law**."), MCL 211.8(f) ("All other personal property not enumerated in this section and **not especially exempted by law**."), MCL 600.4061(4) (". . . the state treasurer shall provide only that information in the possession of the department of treasury that is **not otherwise exempted by law** from disclosure."), and MCL 600.6017 ("Any share or interest of any stockholder in any corporation, that is or may be incorporated under the authority of any law of this state, **unless expressly exempted by law**.").

[11] See, e.g., MCL 397.605(1) ("**Except as otherwise provided by statute** or by a regulation adopted by the governing body of the library, the selection of library materials for inclusion in a library's collection shall be determined only by an employee of the library."), MCL 450.793(7) ("**Except as otherwise provided by statute**, . . . the contract shall be awarded to the lowest bidder qualified to perform the contract."), MCL 600.232 ("Appeals to the supreme court may be by right or by leave as provided by the rules of the supreme court, **except as otherwise provided by statute**."), MCL 600.2051 ("A corporation, either domestic or foreign, may sue or be sued in its corporate name, **except as otherwise provided by statute**."), MCL 600.2401 ("**Except as otherwise provided by statute**, the supreme court shall by rule regulate the taxation of costs."), and MCL 600.4012 ("**Except as otherwise provided by statute**, a plaintiff shall pay a fee of $6.00 at the time a writ to the garnishee of garnishment of periodic payments is served upon the garnishee.").

15.243(1)(d),and MCL 15.243(1)(h)) and nothing in FOIA itself is altered by such enactments.

Moreover, if one is looking for statutes related to the MCCA (including whether any particular records or information belonging to the MCCA may be exempt from FOIA), he or she would look to the Insurance Code.[12] The Legislature must still comply with Section 25's requirement when it revises, alters, or amends a statutory provision;[13] it has not done so in this case (or in the myriad exemptions contained in statutes outside of FOIA). The Legislature's enactment of MCL 15.243(1)(d) as part of that Code was proper, entirely constitutional, and is entitled to deference from this Court. The Court of Appeals' holding that MCL 500.134 did not violate Section 25 because it did not revise, alter, or amend FOIA is consistent with the Legislature's plenary authority and the Constitution.

[12] The Insurance Code of 1956 comprehensively addresses the MCCA, including detailing its operation, oversight, and rights with respect to a FOIA request. In fact, there are only two references to the MCCA outside of the Insurance Code, which do not impact this analysis. See MCL 124.9 (requiring a group self-insurance pool to be a member of the MCCA) and MCL 550.991 (codifying an executive order transferring the position of the Commissioner of the Office of Financial and Insurance Regulation as a member or chair of the MCCA Board to the Director of the Department of Insurance and Financial Services).

[13] As the MCCA indicated in its Response to Plaintiffs' Application, there are occasions when the Legislature must re-enact and republish FOIA. (Response, pp 28-29). This case and Plaintiffs' example of 2006 PA 482 perfectly illustrate the difference between when FOIA must be re-enacted and republished and when it is not required. 2006 PA 482 amended FOIA; MCL 500.134(4) did not. The Legislature was required to re-enact and republish the affected FOIA provision under Section 25 when it enacted 2006 PA 482; the Legislature was not required to do so when it enacted 1988 PA 349.

II. EVEN IF THIS COURT DISAGREES AND FINDS THAT THE ENACTMENT OF MCL 500.134 VIOLATES THE PLAIN LANGUAGE OF CONST 1963, ART 4, § 25, THERE IS STILL NO CONSTITUTIONAL VIOLATION BECAUSE THE INSURANCE CODE IS AN ACT COMPLETE IN ITSELF.

If this Court disagrees with the analysis set forth above (and by the Court of Appeals) and finds that MCL 500.134 amended FOIA,[14] leave to appeal is still not warranted because MCL 500.134 is part of an act that is complete within itself, which exempts it from Section 25.

Michigan courts have long recognized that an act complete within itself does not violate Const 1963, art 4, § 25. *Alan, supra; Nalbandian, supra*. As noted by this Court as long ago as 1865, concluding that an act complete within itself violates the Constitution would violate the Constitutional language's intent:

> An amendatory act which purported only to insert certain words, or to substitute on phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation. **But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent**.

People v Mahaney, 13 Mich 481, 496 (1865) (emphasis added).

A statute is "complete within itself" if it "requires reference to no other statute for its meaning." *People v Blount*, 87 Mich App 501, 504-05; 275 NW2d 21 (1979). Stated differently, an act is complete if it "does not confuse or mislead, but publishes in one act for all the world to see what it purports to do." *In re Constitutionality of 1972 PA 294*, 389 Mich 441,

[14] Such a conclusion, as explained above, would be contrary to the Constitution and principles of statutory construction because MCL 15.243(1)(d) allows for exceptions to FOIA to be contained in separate statutes. MCL 500.134(4) does not amend FOIA by reference or implication.

476; 208 NW2d 469 (1973). Importantly, an "act within itself" may provide exceptions to other laws without re-publishing those other laws and not conflict with Section 25 even when the original statute did not expressly permit such exceptions (unlike FOIA). *Ass'n of Bus Advocating Tariff Equity v Michigan Public Service Comm'n* (*In re Application of International Transmission Company for Expedited Siting Certificate)*, 493 Mich 947; 828 NW2d 22 (2013) ("*ABATE*"); *People v Koon*, 494 Mich 1, n 22; 832 NW2d 724 (2013) (holding that the Michigan Medical Marihuana Act, which created an exception to the zero tolerance provision in the Michigan Vehicle Code, was an act complete in itself and did not violate Section 25).

Recently, in *ABATE*, this Court held that an act that created an exception to the general process for transmission line siting did not violate Section 25 because it was an act complete within itself. *Id.*, citing *Alan*, 388 Mich at 276-277 and *Mahaney, supra*. The statute in *ABATE* that provided for the general process for siting transmission lines did *not* contain an express provision that exceptions could be found in other statutes, yet the new separate statute challenged in *ABATE* provided for a different, expedited process for siting certain transmission lines. The Court of Appeals held that Section 25 would be violated if the new statute indeed authorized construction of such lines without republishing and re-enacting the original statute. This Court found this to be error, holding that because the new statute was a "comprehensive legislative scheme for issuing expedited siting certificates, and clearly intends construction of approved transmission lines" it therefore was "an act complete in itself." *Id.*

Like the statutory scheme in *ABATE*, all of the details about the operation, oversight and dealing with the MCCA can be found in the Insurance Code.[15] The Insurance Code, like the new

[15] See footnote 10 above. There are two references to the MCCA outside of the Insurance Code, but the existence of those provisions do not change this analysis.

statute in *ABATE* or that in *Koon*, is a comprehensive legislative scheme that provides for all of the details about the operation, oversight and dealings, including the records exemption, of the MCCA. The Insurance Code is an act complete in itself and, even if this Court disagrees with the analysis found in the first section of this Supplemental Brief, it should still find that Section 25 was not violated by MCL 500.134 because it is part of a comprehensive code that is an act complete in itself.

CONCLUSION AND RELIEF REQUESTED

Statutory enactments, as discussed above, are presumed to be constitutional and the Constitution must be construed in a reasonable manner. Plaintiffs' arguments that the Legislature violated Const 1963, art 4, § 25 by enacting MCL 500.134 are not reasonable and lack a "clearly apparent" reason why MCL 500.134 violates the Constitution. The Legislature expressly recognized in FOIA that exceptions to FOIA may exist in other statutes. The Legislature then, exercising its plenary authority, enacted MCL 500.134 to exempt the records of the MCCA (and other entities) from FOIA. In doing so, the Legislature did not revise, amend, or alter FOIA. There was no section of FOIA required to be re-enacted and republished. Const 1963, art 4, § 25 was also not violated by the Legislature's enactment of MCL 15.243(1)(d). Indeed, if Plaintiffs are correct, then the Legislature has acted outside constitutional bounds and violated Const 1963, art 4, § 25 in hundreds of instances, and hundreds of other laws would be rendered unconstitutional as well. Such an interpretation is unreasonable and inconsistent with the Constitution's plain language. For these reasons, and the reasons set forth in the MCCA's Response to Plaintiffs' Application for Leave to Appeal, Defendant-Appellant MCCA request that this Court deny leave to appeal.

Respectfully submitted,

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